

Chapter V

Civil Liability of ISPs, the Internet, and Law

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ABSTRACT

This chapter examines the Internet and law relationship. Using rules and decisions on ISP liability for civil defamation to illustrate, the chapter attempts to identify and proffer solutions to the challenges posed by the Internet to law. It suggests legal recognition of the distinctive nature of the Internet by policy makers and administrators as the key to addressing the legal issues continually raised by the Internet with the result that appropriate legal strategies would be applied to the Internet. The chapter also advocates international legislative action on the Internet issues. Law, including its substantive and procedural contents, interpretation and administration, is an important factor for encouraging or hindering continued Internet development.

INTRODUCTION

Law is an important factor in any field of human activity. Depending on the contents of the relevant legal regime, law is capable of encouraging or hindering the development of such activity. The Internet is not an exception. Talking about the Internet and/or its development, expansion,

or prospects without discussing the law's role, amounts to leaving out an indispensable aspect of the structure. The Internet has been playing increasingly critical role in the modern world. The relationship between the law and the Internet, therefore, requires close scrutiny. Examination of the past and present relationship is as important as looking at the future. A look at the past and the

present may reveal difficulties, and may also offer the benefit of hindsight in suggesting models of the Internet law for the future. This would assist the policy initiators in assimilating appropriate ingredients for developing successful strategies for Internet deployment.

The successful evolution of the Internet has resulted in the use of the Internet for a whole range of operations different from its original purpose, which was basically to facilitate communication and data sharing among researchers. Recent increase in processing power and cheap availability of network bandwidth has brought many businesses and millions of users on the Internet. This exponential growth is expected to continue in the coming years. An English judge once described the Internet as “a new phenomenon” (John Bunt v. David Tilley [2006] EWHC 407, para.9 (Eady J.)). But like most other fields of human or commercial activity, “the Internet is not and never has been a law-free zone” (Cummins, 2003, p. 10). The geographic reach of the Internet is an important issue. It has been rightly observed that the Internet has the “ability to effortlessly reach people” (Cummins, 2003, p. 1) across jurisdictional boundaries. It is also clear that the Internet “undermines the feasibility and legitimacy of laws based on geographic boundaries” (Bettelheim, 2006, p. 24; Kohl, 2004) because “the Internet has no territorial boundaries” (Digital Equip. Corp. v. Altavista Tech. Inc., 1997, p. 462). It is also unclear what portion of the Internet a country may legitimately treat as within its jurisdiction (Rundle, 2006, p. 12).

The Internet has continued to raise several (and sometimes) novel issues for the law in areas such as intellectual property rights, defamation, breach of confidence, and right of privacy. The use of the Internet for activities relating to these areas of law, arguably, exposes users to liability. The scope of civil liability is not closed; the dynamic nature of law and the realities of modern life determine that new areas of liability may be added by legislation or judicial decision while old rules

on liability may be modified as the need arises. For example in *Campbell v. MGN Ltd.* (2004), a fashion model sued a newspaper for covertly taking and publishing pictures of her receiving therapy from a self-help group. A split UK House of Lords reversed the lower court and held that the action constituted a breach of confidence and invasion of privacy. In *Douglas v. Hello! Ltd.* (No.3) (2005), the English Court of Appeal upheld the lower court’s judgment in favour of the claimant film actors. The defendant magazine’s action in taking and publishing photos was held as invasion of privacy and breach of confidence. These two cases established that breach of privacy is now an area of civil liability in English law. It is unlikely that the two decisions would have been different if the Internet medium had been used for publishing the offending pictures.

This chapter addresses the question of the liability of Internet service providers (ISPs) for defamatory materials created by third parties. The discussion is restricted to civil defamation only and does not extend to criminal defamation. The objective of this chapter is to reveal the difficulties with the current regime on Internet defamation. The concern is with the appropriate relationship between legal rules and the Internet. Has the law responded positively and actively to the challenges posed by the Internet? Are the present legal, regulatory, and institutional mechanisms sufficient or adequate safeguards for the ISPs? Are there difficulties with the application of old or traditional rules at both national and transnational levels? Is unilateral, bilateral, regional, or global solution to the Internet-related issues to be preferred? Some of the decided cases reveal difficulties, which indicate the law’s critical role in the continued development of the Internet. The first step in overcoming these difficulties is the awareness of their existence by legal policy makers, administrative agencies, and judicial authorities. Recognition of the Internet as being of a distinctive class and having a peculiar character is the key to effective Internet legal policy, administration, and interpretation.

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